IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-813

FRITHJOF O.M. WESTBY, individually and as Secretary of the South Dakota Department of Social Services, and VERN WOODARD, individually and as Director of the South Dakota Division of Social Welfare,

Appellants

v.

JANE DOE, on behalf of herself and all others similarly situated.

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

JURISDICTIONAL STATEMENT

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December, 1975

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vs.

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JURISDICTIONAL STATEMENT

Appellants appeal from the Judgment of the United States District Court for the District of South Dakota, entered on September 29, 1975, invalidating a regulation of the South Dakota Department of Social Services and enjoining its enforcement so as to deny Plaintiff-Appellee medicaid benefits covering the cost of her abortion, and submit this Statement to show that the Supreme Court of the United States has jurisdiction on the appeal and that a substantial question is presented as to require plenary consideration.

OPINION BELOW

The opinion of the District Court of the District of South Dakota, Western Division is not reported. A copy of that opinion is attached hereto as Appendix A.

JURISDICTION

Appellees commenced this action seeking injunctive relief to enjoin officials of the South Dakota Department of Social Services from refusing to pay for voluntary abortions under the Medicaid Program, pursuant to title XIX of the Social Security Act of 1935, and all Acts supplementary and amendatory thereto, 42 U.S.C. §1396 *et. seq.* Pursuant to 28 U.S.C. §2281 *et. seq.* a three-judge district court was convened. A judgment favorable to appellee was entered by that court on September 24, 1974. Subsequently, Appellants filed a Notice of Appeal with that Court on October 3, 1974 giving notice of appeal to the United States Supreme Court pursuant to 28 U.S.C. §1253. That appeal was docketed in this Court on November 30, 1974 as No. 74-684. On March 17, 1975 the lower court's judgment was vacated and the case remanded to the United States District Court for the District of South Dakota for further consideration in light of *Hagans* v. *Lavine*, 415 U.S. 528, 543-545 (1974).

A second judgment favorable to Appellee was entered by the District Court on September 29, 1975. Appellants filed a Notice of Appeal with that Court on October 20, 1975, giving notice of this present appeal to the United States Supreme Court. The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. §1253.

STATE LAW INVOLVED

Rule 28D.210 of the South Dakota Department of Social Services provides:

> Physician services not covered under the Medical Assistance Program are as follows:

> 1. Any items or services which are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member.

The above cited rule was adopted pursuant to South Dakota Compiled Laws Annotated §§28-6-1, 2 and 4 (1967), Vol. 9, pp. 362 and 363.

S.D.C.L. 28-6-1 (1967) provides:

> The State Department of Public Welfare is hereby authorized and empowered to provide medical or remedial care on behalf of persons having insufficient income and resources to meet the necessary cost thereof, in accordance with standards which the state public welfare commission shall adopt and provide pursuant to the provisions of title XIX of the 1965 amendments to the federal Social Security Act.

S.D.C.L. 28-6-2 (1967) provides:

> The State Public Welfare Commission shall adopt rules and regulations requiring state-wide operation of the plan adopted hereunder.

S.D.C.L. 26-6-4 (1967) provides:

> The amount, duration, and scope of medical or remedial care and services and the basis for and extent of vendor payments in behalf of any person under this chapter shall be established by rules and regulations of said Commission, and may include, at the discretion of the Commission, any or all individuals and services for which federal funds are available to the state department under the Social Security Act; provided however, that the rules and regulations and the implementation thereof shall be subject to the review of the Legislature.

QUESTION PRESENTED

Whether the appellants in administering the Medicaid Program under title XIX of the Social Security Act are required to pay the costs of Appellee's voluntary abortion.

STATEMENT OF THE CASE

Pursuant to Rule 28D.210 of the South Dakota Department of Social Services, the Division of Social Welfare in administering the Medicaid Program will pay for only therapeutic abortions.

Plaintiff Jane Doe became pregnant about the 18th day of January, 1974. She decided to have this pregnancy terminated by abortion. Being a qualified medicaid recipient, Plaintiff did on the 19th day of April, 1974, commence action against Appellants herein seeking injunctive relief to enjoin officials of the South Dakota Department of Social Services from not paying for elective abortions.

This action was brought pursuant to 42 U.S.C. §1983 with jurisdiction being conferred upon the District Court by 28 U.S.C. §1343 (3) and (4).

Pursuant to 28 U.S.C. §2281, a three-judge court was convened.

Subsequent to the filing of the complaint on April 19, 1974, the following motions, decisions, and appeal were made:

April 19, 1974

Plaintiff made motion for temporary restraining order, preliminary injunction, and to proceed as class action.

April 30, 1974

Defendant Woodard made motion to dismiss.

May 6, 1974

Defendant Woodard filed answer to Plaintiff's complaint.

Defendants made motion for appointment of guardian *ad litem* for the child concerned, as required by FRCP 17c, and to allow intervention of said guardian pursuant to FRCP 24 (a) (2).

Defendants moved to allow intervention of unknown father of child concerned as provided by FRCP 24 (a) (2).

May 7, 1974

Court entered order denying motion for appointment of guardian *ad litem*.

Court entered order denying motion for preliminary injunction.

Court entered order denying motion for intervention of unknown father.

Court entered a memorandum opinion stating, *inter alia:*

> It is the opinion of this Court that this Court is without jurisdiction to provide the interlocutory relief requested. This Court feels that this case is a proper one for a three-judge district court pursuant to 28 U.S.C. §2281 . . . This Court is today writing the Chief Judge of the Eighth Circuit Court of Appeals to request the empaneling of such a three-judge panel.

May 8, 1974

Plaintiff made application for interlocutory injunction before a three-judge Court.

May 9, 1974

Plaintiff made application for temporary restraining order.

District Judge Bogue entered order denying motion for temporary restraining order.

May 22, 1974

Order dated May 10 entered: Chief Circuit Judge Pat Mehaffy designated District Judge Paul Benson, and Circuit Judge Donald R. Ross to serve with District Judge Andrew Bogue to constitute the three-judge Court.

Defendant Westby enters Answer to Plaintiff's complaint.

May 31, 1974

Plaintiff enters motion for summary judgment.

June 19, 1974

Defendants make motion to dismiss.

Defendants make motion for Summary Judgment.

September 24, 1974

Three-judge Court entered MEMORANDUM OF DECISION AND ORDER and JUDGMENT holding the administration and application of 28D.2 of the rules of the South Dakota Department of Social Services in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and enjoining the Defendants, their agents, their employees, successors in interest, and all others acting in concert with them, from the enforcement or execution and application of Rule 28D.2 of the Rules of the South Dakota Department of Social Services so as to deny Plaintiff medicaid benefits covering the cost of her abortion.

October 3, 1974

Defendants-Appellants filed Notice of Appeal with the United States District Court for the District of South Dakota giving notice of appeal to the United States Supreme Court.

Defendants-Appellants filed a Motion For Stay of judgment Pending Appeal with the District Court.

November 30, 1974

Appeal was docketed with the United States Supreme Court as No. 74-684.

December 2, 1974

District Court enters Order denying Defendants'-Appellants' Motion For Stay of Judgment Pending Appeal.

December 11, 1974

Defendants-Appellants make Application For Stay of Judgment of the United States District Court For the District of South Dakota Western Division to the Honorable Harry A. Blackmun, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eighth Circuit.

December 19, 1974

Defendants'-Appellants' Application for Stay denied by Associate Justice Harry A. Blackmun.

January 9, 1975

Defendants-Appellants refer their Application for Stay to the Honorable Byron R. White, Associate Justice of the Supreme Court of the United States.

March 17, 1975

Supreme Court vacated the judgment of the District Court and remanded the case to the District Court for further consideration in light of *Hagans* v. *Lavine*, 415 U.S. 528, 543-545 (1974).

March 31, 1975

Defendants file motion with United States District Court for the District of South Dakota Western Division to remand the case to the single district judge.

April 18, 1975

Order of Supreme Court vacating District Court's Judgment and remanding case for further consideration in light of *Hagans* v. *Lavine*, 415 U.S. 528, 543-545 (1974) filed with District Court.

Order of three-judge District Court entered directing parties to file supplemental briefs within 30 days directed solely to the question of whether the relevant state regulations violate 42 U.S.C. §1396, *et. seq.*

May 7, 1975

Defendants file motion to dismiss on the basis that the Social Security Act is not in the category of "any Act of Congress providing for equal rights of citizens or of all persons," *Acosta* v. *Swank*, 325 F-Supp. 1157 (D.C. N.D. Ill. 1971), and on the further basis that the case presents a political question of which the Constitutional Courts should not make a judicial determination.

September 29, 1975

Three-judge District Court enters its JUDGMENT declaring the South Dakota Department of Social Services Regulation 28D.210 to be violative of the requirements to Title XIX of the Social Security Act, and also in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Appellants filed a Notice of Appeal on October 20, 1975, with the United States District Court for the District of South Dakota Western Division giving notice of this Appeal to the

United States Supreme Court. Appellants also filed on October 20, 1975, a Motion For Stay of Judgment Pending Appeal with said District Court.

The Plaintiff-Appellee obtained an abortion from her physician on May 11, 1974. The bill has never been submitted to the Department of Social Services or any agency thereof.

THE QUESTION IS SUBSTANTIAL

Title 28 U.S.C. §1253 permits an appeal of the decision below as a matter of right since the court below consisted of a three-judge panel convened pursuant to 28 U.S.C. §2281, and said Court granted permanent injunctive relief involving state officers in the application of a state law of general and statewide application on constitutional and statutory grounds.

Cases sustaining the jurisdiction of the United States Supreme Court are:

1. *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969)
2. *Board of Regents of the University of Texas System* v. *New Left Education Project*, 404 U.S. 541 (1972)
3. *Bracher* v. *Fisher*, 49 F. 2d 759 (6th Cir. 1931)
4. *Ex Parte Collins*, 277 U.S. 565 (1928)
5. *Ex Parte Public National Bank of New York*, 278 U.S. 101 (1928)
6. *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963)
7. *Florida Lime and Avacado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73 (1960)
8. *Hagans* v. *Lavine*, 415 U.S. 528 (1974)

9. *Lee* v. *Rosenberry*, 200 F. 2d 155 (6th Cir. 1952)

10. *Moody* v. *Flowers*, 387 U.S. 97 (1967)

11. *Oklahoma Gas and Electric Company* v. *Oklahoma Packing Company*, 292 U.S. 386 (1926)

12. *Palmetto Fire Insurance Company* v. *Connecticut*, 272 U.S. 295 (1926)

13. *Pennsylvania Public Utility Commission* v. *Pennsylvania Railway Company*, 382 U.S. 281 (1965)

14. *Query* v. *United States*, 316 U.S. 486 (1942)

15. *United States* v. *Georgia Public Service Commission*, 371 U.S. 285 (1963)

16. *Zemel* v. *Rusk*, 381 U.S. 1 (1965)

The issue presented here on appeal is substantial. The question of whether the State Department of Social Services must fund voluntary abortions is of vital concern to the State.

In addition, within the periphery of the central issue involved, this case presents a serious jurisdictional question, i.e. whether the judicial branch of government can render a ruling which vitiates the will of the people. Prior to the time that the Plaintiff-Appellee commenced this action, the South Dakota Department of Social Services was considering the adoption of a rule that would provide for the funding of voluntary abortions under the medical assistance program. However, in the aftermath of a public hearing held in March of 1974, at which hundreds upon hundreds of South Dakota residents voiced their views on the subject, it was determined by the Board of Social Services, that such a policy should not be adopted. This was so because the overwhelming majority of those expressing

themselves were vehemently opposed to using tax dollars for payment for voluntary abortions. Thus, Appellants respectfully submit that this case presents a question which is political, and not judicial, in nature, and hence is not a matter for the exercise of judicial power. *Colegrove* v. *Green*, 328 U.S. 549 (1946). Although the *Colegrove* case has been reversed, the doctrine enunciated therein remains valid.

CONFLICT AMONG FEDERAL COURTS OF APPEAL

There is a conflict between the Third and Sixth Circuits whether Title XIX of the Social Security Act requires payment for voluntary abortions. The Third Circuit has held that the states cannot decline to finance non-therapeutic abortions without violating the requirements of Title XIX – *Doe* v. *Beal*, No.'s 74-1716 and 74-1727 (filed July 21, 1975, 3rd Cir.) The Sixth Circuit has held that state regulations denying payment for non-therapeutic abortions do not violate Title XIX of the Social Security Act. *Roe* v. *Ferguson*, 515 F.2d 279 (6th Cir. 1975).

CONCLUSION

For the reasons stated, it is respectfully submitted that this Court require briefs and oral argument on the issues presented, or in the alternative, to vacate the judgment of the lower court and remand the case with directions to dismiss.

Respectfully submitted,

WILLIAM J. JANKLOW
Attorney General of South Dakota

WILLIAM H. ENGBERG
Assistant Attorney General

Attorneys for Appellants

PROOF OF SERVICE

, Assistant Attorney General for South Dakota, a member of the Bar of the Supreme Court of the United States, certifies that copies of the JURISDICTIONAL STATEMENT of Appellants were served by first class mail, postage prepaid, upon Michael A. Wolff and Daniel L. Jackson of Black Hills Legal Services, Inc., 714 4th Street, Rapid City, South Dakota 57701; and Ms. Patricia Butler of National Health Law Program, 10995 Le Conte Avenue, Los Angeles, California 90024, Attorneys for Appellee, this day of December, 1975.

One of the Attorneys for
Appellants

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

JANE DOE, on behalf of herself and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	CIVIL 74-5017
FRITHJOF O.M. WESTBY, individually and as Secretary of the South Dakota Department of Social Services, and VERN WOODARD, individually and as Director of the South Dakota Division of Social Welfare,	)	MEMORANDUM OF DECISION AND ORDER.
Defendants.	)	

Before ROSS, Circuit Judge, BENSON and BOGUE, District Judges.

BENSON, District Judge.

STATEMENT OF THE CASE

In this action, plaintiff seeks both declaratory and injunctive relief under 28 U.S.C. §1343(3) and (4), and §2201, 42 U.S.C.

§1983, and statutory relief under Title XIX of the Social Security Act of 1935, 42 U.S.C. §1396 *et seq.* She challenges as unconstitutional, and seeks to restrain, a policy promulgated by the Social Services Department of the State of South Dakota in its administration of Chapter 28 D.2 of the rules of the South Dakota Department of Social Services, which precludes Medicaid payments for abortions unless necessary to save the life or health of the mother. Upon this issue, and pursuant to 28 U.S.C. §2281, a three-judge court was designated to hear the case. She also alleges the regulations and policy violate the federal Medicaid Statutes, 42 U.S.C. §1396 *et seq.*

FINDINGS

There is no significant dispute between the parties on the facts. As enumerated in the Court's previous order,[1] the facts are:

1. At the time the complaint was filed, plaintiff, Jane Doe, was eight weeks pregnant and the unmarried mother of four children – ages ten, nine, eight, and four.[2] She was the recipient of Aid to Dependent Children under the federal-state program administered pursuant to the Social Security Act of 1935, 42 U.S.C. §601 *et seq.* She was also eligible for medical assistance (Medicaid) under Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.*

2. A pregnancy is a condition which requires medical care.

3. In South Dakota the Medicaid program is administered by the Defendant Frithjof O.M. Westby, who, in his position as Secretary of Social Services, is by statute the head of the Department of Social Services. Included in the Department of Social Services is a Division of Social Welfare. The head of the division is Defendant Vern Woodard.[3] Plaintiff, in consultation with her physician, decided to terminate her pregnancy. Termination was not

"medically necessary", but was desired by the plaintiff because she felt she was unable to care for another child, and an abortion would be in her "best interest". She did not have the financial resources to pay for an abortion and was advised by the defendants, or their agents, through her attorney, that an elective abortion was not covered under the Medical Assistance Program and Medicaid would not pay for her abortion.

4. Rule 28D.210 of the South Dakota Department of Social Services provides:

> "Physician services not covered under the Medical Assistance Program are as follows:
>
> 1. Any items or services which are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member."

Pursuant to the foregoing rule, defendants will not extend Medicaid to cover payment for a nontherapeutic abortion for one otherwise qualified for Medicaid, but will authorize payment for an abortion when the claim is accompanied by a written medical report indicating that a therapeutic abortion is necessary.

5. Under the South Dakota program, a pregnant Medicaid recipient who chooses to carry her pregnancy to full term is given "any medical care that would be required in connection with the delivery of a child up to thirty days hospitalization of the mother and child and unlimited doctor care and services".

6. At about the twelve week point of her pregnancy, plaintiff

secured an abortion from her physican. Plaintiff remains indebted to the physician for his services.

On September 24, 1974, the three-judge court filed its Memorandum Decision and entered judgment for the plaintiff. In its decision, the panel examined only the constitutional issue presented by the plaintiff, whether "the policy being followed by the State of South Dakota in its administration of the medicaid program as it relates to pregnant women, otherwise qualified for medicaid, violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States by discriminating between medicaid eligible women who carry their pregnancy to term, and medicaid eligible women who desire to terminate their pregnancy for nontherapeutic reasons, and thereby inhibits the one class in the exercise of a fundamental right." The Court did not consider the plaintiff's allegation that the State's policy violated Title XIX. The Supreme Court summarily vacated and remanded for consideration in light of *Hagans* v. *Lavine*, 415 U.S. 528 (1974).[4]

JURISDICTION

Following remand, defendants moved to dismiss the action for lack of jurisdiction. In denying the motion, this Court held:

> "It is clear that the Plaintiff's constitutional claim is of sufficient substance to support federal jurisdiction, and the requirement that the constitutional claim not be reached until the statutory claim has been considered does not divest this Court of jurisdiction in the matter."

Hagans v. *Lavine, supra*, states:

> "[T]he coincidence of a constitutional and statutory claim should not automatically require a single-judge district court to defer to a three-judge panel, which, . . .

> could then merely pass the statutory claim back to the single judge." at 544.

In this case, the single-judge district court did defer to the three-judge panel which, after appropriate hearing, made its findings on the facts in the case. Additionally, both the statutory and constitutional issues have been fully argued to the three-judge court, and it has jurisdiction to consider the statutory claim. See *California Department of Human Resources* v. *Java*, 402 U.S. 121 (1971); *Rosado* v. *Wyman*, 397 U.S. 397 (1970); and *King* v. *Smith*, 392 U.S. 309 (1968); in addition to *Hagans* v. *Lavine, supra*.

In the interest of judicial economy and efficiency, this three-judge court will proceed to consider the statutory claim.

STATUTORY CLAIM

Subsequent to the Supreme Court's mandate, the Third Circuit Court of Appeals considered *en banc* a case which presented an issue almost identical to the issue now before this Court. See *Doe* v. *Beal*, Nos. 74-1716 and 74-1727 (filed July 21, 1975, 3rd Cir.)[5] In *Beal*, a three-judge panel had first considered the statutory claim, but had decided the Pennsylvania procedures under its Medical Assistance Program restricting payments for abortions were consistent with Title XIX of the Social Security Act. *Doe* v. *Wohlgemuth*, 376 F.Supp. 173, 182-86 (W.D. Pa. 1974). They next considered the allegations of unconstitutionality and declared the procedures to be in violation of the Equal Protection Clause. *Doe* v. *Wohlgemuth* at 186-92. Both arguments were renewed on appeal.

The Court of Appeals proceeded with a comprehensive analysis of the Title XIX issue. In applying that analysis to the Pennsylvania regulations, the *Beal* Court found them inconsistent with the federal Act. It made the following conslusions:

"Applying the above analysis to the Pennsylvania regulations before us, we find them to be inconsistent with the Act. Since the Commonwealth of Pennsylvania pays for full-term deliveries and also for therapeutic abortions, it is plain that the state has determined, in its discretion, that pregnancy is a condition for which medical treatment is 'necessary' within the meaning of Title XIX. The next question is whether some justification can be found in the statute for preventing an attending physician from choosing non-therapeutic abortion as the method for treating a pregnancy. We can find none. Economy will not do, since in most cases non-therapeutic abortion is the cheapest method of treatment. See *Doe* v. *Rose, supra*, at 1116-17, citing *Klein* v. *Nassau Cty. Med. Ctr. supra* note 12; *Doe* v. *Wohlgemuth, supra*, at 187. Nor will protection of the recipient's health, under §1396a(a) (19) suffice; the state itself admitted at oral argument that non-therapeutic abortion is the least dangerous alternative for the pregnant woman, at lease during the first trimester. See *Roe* v. *Wade, supra* at 163. Not only are the state's abortion regulations not justified by any statutory policy, but they also run directly counter to §1396a(a) (10) (B) and (C), since the 'least voluntary method of treatment' requirement which the regulations impose on pregnant women is imposed on no other class of recipient. We therefore conclude that once the state has decided to finance full-term delivery and therapeutic abortion as methods for the treatment of pregnancy, it cannot decline to finance non-therapeutic abortions without violating the requirements of Title XIX. Since the decisions of the Supreme Court have forced the states to include elective abortion in the legal practice of medicine through the second trimester of pregnancy, we also hold that the statute requires Pennsylvania to fund abortions through the end of the second trimester." *Doe* v. *Beal*, at 19-20.

We adopt the reasoning of the *Beal* Court, and hold that South Dakota, in extending medical aid for full term deliveries and also for therapeutic abortions, has determined, in its discretion, that pregnancy is a condition for which medical treatment is necessary within the meaning of Title XIX, and it cannot decline to finance nontherapeutic abortions without violating the requirements to Title XIX.

We further incorporate in this decision, by reference to the decision of this Court in *Doe* v. *Westby, supra*, the previous holding of this Court that the State of South Dakota, in providing Medicaid benefits to those eligible pregnant women who choose to carry their pregnancies to term and those who receive therapeutic abortions and deny Medicaid benefits to those eligible women who elect on the medical judgment of their physician a constitutionally protected nontherapeutic abortion as defined in *Roe* v. *Wade*, 410 U.S. 113 (1973), has created a classification which is in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

The plaintiff is entitled to Medicaid benefits covering the cost of her abortion.

The defendants, their agents, their employees, succesors in interest, and all others acting in concert with them, are enjoined from the enforcement or execution and application of Rule 28 D.2 of the Rules of the South Dakota Department of Social Services, or the statute under which such rule was promulgated, so as to deny the plaintiff Medicaid benefits covering the cost of her abortion.

It is assumed the State of South Dakota will give full credence to this decision, and that where Medicaid benefits are extended to Medicaid eligible pregnant women who elect to carry their pregnancy to term or who receive therapeutic abortions, Medicaid benefits will also be extended to Medicaid eligible pregnant women who elect, on the medical judgment of their physician, constitutionally protected nontherapeutic abortions.

IT IS ORDERED that judgment be entered accordingly.
Dated this 30th day of September, 1975.

DONALD R. ROSS
UNITED STATES CIRCUIT JUDGE

PAUL BENSON
UNITED STATES DISTRICT JUDGE

ANDREW W. BOGUE
UNITED STATES DISTRICT JUDGE

NOTICE OF ENTRY

The original of this copy was filed and entered in the office of the Clerk of the United States District Court for the District of South Dakota on the 29th day of September, 1974

/s/ William J. Sratka, Clerk

1 *Doe* v. *Westby*, 383 F.Supp. 1143 (D.S.S. 1974).

2 Plaintiff, who appears under an assumed name, was a married woman at the time of the birth of her children.

3. *See* South Dakota Compiled Laws Chapter 1-36.

4 The March 16, 1975, order of the Supreme Court, 420 U.S. 968, reads in part, "Judgment vacated and case remanded for further consideration in light of Hagans v. Lavine, 415 U.S. 528, 543-545 (1974)."

5. The case was an appeal of *Doe* v. *Wohlgemuth*, 376 F.Supp. 173 (W.D. Pa. 1974). The caption was changed to Doe v. Beal, pursuant to F.R.C.P. 25(a)(1), after the appeal had been docketed.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

JANE DOE, on behalf of herself and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	CIV 74-5017
FRITHJOF O.M. WESTBY, individually and as Secretary of the South Dakota Department of Social Services, and VERN WOODARD, individually and as Director of the South Dakota Division of Social Welfare,	)	
Defendants.	)	

JUDGMENT

Pursuant to the order for judgment entered in the above entitled matter this date,

IT IS ADJUDGED AND DECREED that in its administration and application of Rule 28D.2 of the Rules of the South Dakota Department of Social Services so as to provide Medicaid benefits to those eligible women who choose to carry their pregnancies to term and those who receive therapeutic

abortions, and deny Medicaid benefits to those eligible pregnant women who elect on the medical judgment of their physician, constitutionally protected nontherapeutic abortions as defined in *Roe* v. *Wade*, 410 U.S. 113 (1973), the State of South Dakota has violated Title XIX of the Social Security Act of 1935, 42 U.S.C. §1396 *et seq.*, and has created a classification which is in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

IT IS FURTHER ADJUDGED AND DECREED that plaintiff herein is entitled to Medicaid benefits covering the cost of her abortion.

IT IS FURTHER ADJUDGED AND DECREED that the defendants, their agents, their employees, successors in interest, and all others acting in concert with them, are enjoined from the enforcement or execution and application of Rule 28D.2 of the Rules of the South Dakota Department of Social Services, or the statute under which such rule was promulgated, so as to deny the plaintiff Medicaid benefits covering the cost of her abortion.

Dated this 30th day of September, 1975.

DONALD R. ROSS
UNITED STATES CIRCUIT JUDGE

PAUL BENSON
UNITED STATES DISTRICT JUDGE

ANDREW W. BOGUE
UNITED STATES DISTRICT JUDGE

NOTICE OF ENTRY
The original of this copy was filed and entered in the office of the Clerk of the United States District Court for the District of South Dakota on the 29th day of September, 1974.

/s/ William J. Sratka, Clerk

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

JANE DOE, on behalf of herself and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	CIV 74-5017
FRITHJOF O.M. WESTBY, individually and as Secretary of the South Dakota Department of Social Services, and VERN WOODARD, individually and as Director of the South Dakota Division of Social Welfare,	)	
Defendants.	)	

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the above named Defendants, Frithjof O.M. Westby, individually and as Secretary of the South Dakota Department of Social Services, and Vern Woodard, individually and as Director of the South Dakota Division of Social Welfare, hereby appeal to the United States Supreme Court from the final JUDGMENT in this action dated the 30th day of September, 1975, and filed and entered in the office of the Clerk of the United States District Court for the District of South Dakota on the 29th day of September, 1975.

The statute pursuant to which this appeal is taken is 28 USCA § 1253.

Dated this 16th day of October, 1975.

WILLIAM J. JANKLOW
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